

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DALE WILLS, No. C 07-03354 CW (PR)
Petitioner, ORDER GRANTING RESPONDENT'S
v. MOTION TO DISMISS PETITION AS
JAMES TILTON, (Docket no. 8)
Respondent.

INTRODUCTION

On June 26, 2007, Petitioner Dale Wills, a state prisoner incarcerated at the California State Prison - Corcoran, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging ineffective assistance by his trial and appellate counsel and prosecutorial misconduct. The Court ordered Respondent to show cause why the writ should not be granted. On October 16, 2007, Respondent James Tilton filed a motion to dismiss. Petitioner filed an opposition on January 18, 2008. Respondent filed a reply on January 31, 2008. For the reasons set forth below, Respondent's motion to dismiss is GRANTED.

BACKGROUND

In 1988, Petitioner pled guilty to a first degree burglary charge stemming from an incident that occurred at the home where he was living with his family. He was sentenced to one year in prison.

In May, 1995 Petitioner was arrested in San Lorenzo for being drunk in public. (Mot. to Dismiss at 2.) Police discovered a bike

1 in Petitioner's possession that was reported as stolen from a
2 residence about a half mile from where Petitioner was arrested.
3 (Id.) Petitioner was subsequently charged with first degree
4 burglary and grand theft. (Id.)

5 In May, 1996, Petitioner was found guilty of both the theft
6 and burglary. The court found true the allegation that Petitioner
7 had a prior 1988 conviction for first degree burglary, which
8 constituted a "strike" under California's Three Strikes law. See
9 Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1). The court also found
10 true two allegations that Petitioner had served prior prison terms.
11 See id. § 667.5(b). Petitioner was sentenced to seventeen years in
12 prison based upon his two prior prison commitments and his 1988
13 burglary conviction.

14 Petitioner challenged his conviction in the California Court
15 of Appeal where it was affirmed on June 30, 1997. Thereafter,
16 Petitioner filed two unrelated state habeas corpus petitions in the
17 California Supreme Court alleging various violations of his rights
18 by prison officials.¹

19 In March, 2005, Petitioner discovered a case, People v. Davis,
20 which he contends should have been cited by his trial counsel
21 because it stands for the proposition that one cannot burglarize
22 one's own home.² 18 Cal. 4th 712, 721 (1998) (citing People v.
23

24 ¹ The first of these claims involved an allegedly "arbitrary
25 withholding of Petitioner's tennis shoes by prison officials." The
26 second involved alleged confiscation of his property as well as denial
of access to the courts. Both claims were rejected by the California
Supreme Court with a citation to In re Dexter, 25 Cal. 3d 921 (1979).

27 ² Davis was decided in 1998, two years after Petitioner was
28 sentenced by the trial court.

Gauze, 15 Cal. 3d 709, 714 (1975)). Thus, he claims, Davis invalidates his 1988 burglary conviction because the facts alleged in that conviction involved the burglary of the home where he lived at that time.

Petitioner subsequently filed a petition for a writ of habeas corpus in the Alameda County Superior Court, which was denied on March 21, 2006. He filed a subsequent habeas petition in the California Court of Appeal which was denied on June 1, 2006. Petitioner filed a third habeas petition in the California Supreme Court which was denied on February 7, 2007.

Petitioner filed the present petition for a writ of habeas corpus on June 26, 2007. The claims raised in the petition include: (1) ineffective assistance of counsel for failing to move to strike his 1988 burglary conviction because it was invalid under Davis; and (2) prosecutorial misconduct in charging his previous burglary conviction as a prior, for the same reason.

DISCUSSION

The AEDPA became law on April 24, 1996 and imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest date on which: (A) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (B) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (C) the

1 constitutional right asserted was recognized by the Supreme Court,
2 if the right was newly recognized by the Supreme Court and made
3 retroactive to cases on collateral review; or (D) the factual
4 predicate of the claim could have been discovered through the
5 exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). Also,
6 "[t]he time during which a properly filed application for state
7 post-conviction or other collateral review with respect to the
8 pertinent judgment or claim is pending shall not be counted toward
9 any period of limitation." Id. § 2244(d)(2).

10 A state prisoner with a conviction finalized after April 24,
11 1996, such as Petitioner, ordinarily must file his federal habeas
12 petition within one year of the date his process of direct review
13 came to an end. See Calderon v. United States Dist. Court
14 (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on
15 other grounds by Calderon v. United States Dist. Court (Kelly), 163
16 F.3d 530 (9th Cir. 1998) (en banc).

17 The one-year period generally will run from "the date on which
18 the judgment became final by conclusion of direct review or the
19 expiration of the time for seeking such review." 28 U.S.C.
20 § 2244(d)(1)(A). In a case where a petitioner does not seek review
21 in the state supreme court, "direct review" concludes forty days
22 after the court of appeals renders its decision. Smith v. Duncan,
23 297 F.3d 809 (9th Cir. 2002).

24 In the present case, Petitioner did not seek review in the
25 California Supreme Court. Thus, the judgment became final for
26 purposes of the statute of limitations on August 9, 1997, forty
27 days after the court of appeal rendered its decision. Duncan, 297
28

1 F.3d at 809. Accordingly, Petitioner was required to file a
2 federal habeas corpus petition no later than August 9, 1998.
3 Because he did not file the present petition until June 26, 2007 --
4 nearly nine years after the limitations period had expired -- the
5 petition is untimely unless he can show that he is entitled to
6 tolling or to a delayed commencement of the limitations period.

7 I. Statutory Tolling

8 The petition may nonetheless be timely if the limitations
9 period was tolled under 28 U.S.C. § 2244(d)(2) for a substantial
10 period of time. As noted earlier, AEDPA's one-year limitations
11 period is tolled under § 2244(d)(2) for "[t]he time during which a
12 properly filed application for state post-conviction or other
13 collateral review with respect to the pertinent judgment or claim
14 is pending. . . ." 28 U.S.C. § 2244(d)(2). The limitations
15 period is also tolled during the time between a lower state court's
16 decision and the filing of a notice of appeal to a higher state
17 court. Carey, 536 U.S. at 223. In California, where prisoners
18 generally use the state's original writ system, this means that the
19 limitations period remains tolled during the intervals between a
20 state court's disposition of an original state habeas petition and
21 the filing of the next original state habeas petition in a higher
22 court, provided the prisoner did not delay unreasonably in seeking
23 review in the higher court. See id. at 220-25.

24
25 Petitioner filed his state habeas petition in the Alameda
26 County Superior Court on February 18, 2005. However, he is not
27 entitled to tolling under Section 2244(d)(2) because the
28 limitations period had already run on August 9, 1998. A state

1 habeas petition filed after AEDPA's statute of limitations ended
2 cannot toll the limitations period. "[S]ection 2244(d) does not
3 permit the reinitiation of the limitations period that has ended
4 before the state petition was filed," even if the state petition
5 was timely filed. See Ferguson v. Palmateer, 321 F.3d 820, 823
6 (9th Cir. 2003) (holding that Oregon's two-year limitations period
7 for the filing of state habeas petitions does not alter the
8 operation of the AEDPA, even though prisoners who take full
9 advantage of the two-year period will forfeit their right to
10 federal habeas review). Section 2244(d)(2) cannot revive the
11 limitations period once it has run. It cannot restart the clock to
12 zero; it can only serve to pause a clock that has not yet fully
13 run. Thus, in order to toll the limitations period under
14 § 2244(d)(2), Petitioner should have begun to pursue collateral
15 relief in state court before AEDPA's one-year limitations period
16 had expired. See Ferguson, 321 F.3d at 823; see also Rashid v.
17 Kuhlmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998) ("Once the
18 limitations period is expired, collateral petitions can no longer
19 serve to avoid a statute of limitations").

20 Accordingly, Petitioner's state habeas petition filed on
21 February 18, 2005 does not revive the limitations period because it
22 had already expired. Therefore, without more, Petitioner is not
23 entitled to statutory tolling of the limitations period.

24 II. Delayed Commencement

25 Petitioner argues for a delayed commencement of the
26 limitations period pursuant to 28 U.S.C. § 2244(d)(1)(B) and (C).
27

28 Under 28 U.S.C. § 2244(d)(1)(B), the statute of limitations in

1 habeas proceedings does not begin to run until "the date on which
2 the impediment to filing an application created by state action in
3 violation of the Constitution or laws of the United States is
4 removed, if the applicant was prevented from filing by such state
5 action."

6 Petitioner contends that the State's failure to provide him
7 with effective assistance of counsel amounted to a state-created
8 impediment to his filing of his state and federal habeas petitions.
9 Petitioner is effectively arguing that because he relied upon the
10 Constitutional guarantee of effective assistance of counsel at
11 trial, he was "impeded" from looking into the case law surrounding
12 his 1988 burglary conviction (and subsequently discovering Davis).
13 Petitioner cites Coleman v. Thompson for the proposition that
14 ineffective assistance of state-appointed counsel "constitutes an
15 'impediment to filing an application created by State action in
16 violation of the Constitution.'" 501 U.S. 722, 754 (1991).

17 Coleman is distinguishable from the present case and does not
18 apply because it addresses the issue of procedural default. In
19 Coleman, the petitioner was unable to pursue federal habeas relief
20 because of the failure of his counsel, post-trial, to file a direct
21 appeal before the deadline. Id. Here, Petitioner's counsel
22 allegedly failed to raise a specific motion before or during trial.
23 Counsel's alleged mistake had no effect upon Petitioner's ability
24 to file for collateral relief, despite the fact that Petitioner had
25 no understanding of the relevant case law or the mistake his trial
26 counsel allegedly made. Rather than being defaulted because of his
27 counsel's failure to appeal, Petitioner's claim is time-barred.
28

1 Accordingly, Petitioner's claim that a state-created
2 impediment delayed the onset of the statute of limitations fails
3 because Petitioner, rather than trial counsel, was responsible for
4 timely filing his habeas petition.

5 Petitioner also contends that he is entitled to delayed
6 commencement based upon a new rule of constitutional law handed
7 down by the Supreme Court in Rompilla v. Beard, 545 U.S. 374
8 (2005).

9 Under 28 U.S.C. § 2244(d)(1)(C), the statute of limitations in
10 habeas proceedings does not begin to run until "the date on which
11 the constitutional right asserted was initially recognized by the
12 Supreme Court, if the right has been newly recognized by the
13 Supreme Court and made retroactively applicable to cases on
14 collateral review."

15 Petitioner claims that June 30, 2005, the date of the Supreme
16 Court's ruling in Rompilla, is the proper starting date for the
17 statute of limitations. He states:

18 In Rompilla, the Supreme Court, for the very
19 first time, held that an attorney's failure to
20 conduct an adequate investigation of prior
21 convictions amounted to deficient performance,
22 see 545 U.S. at 383, that was sufficiently
23 prejudicial to sustain a finding of ineffective
24 assistance of counsel. See id. at 390. Thus,
25 the Rompilla Court announced a "new rule." And
26 because Rompilla is a habeas proceeding, it
27 necessarily follows then, a fortiori, that it
28 has been "made retroactively applicable to
cases on collateral review" as the holding is
dependent on retroactivity, i.e., Rompilla
could not have obtained the relief he did
unless the decision called for retroactive
application.

(Opp'n at 18-19.)

The Supreme Court's decision in Rompilla did not pronounce a

1 new rule of constitutional law as the term is used in section
2 2244(d)(1)(C). Instead, the case cites Strickland v. Washington,
3 466 U.S. 668 (1984), which announced the current rule under federal
4 law for reviewing ineffective assistance of counsel claims. See In
5 re Hutcherson, 438 F.3d 749 (11th Cir. 2006) (denying petitioner's
6 request to file a second habeas corpus petition under 28 U.S.C.
7 § 2244(b) because "the Court's decision in Rompilla was another
8 interpretation of the Court's long-standing principles set forth in
9 Strickland v. Washington" (internal citations omitted)).

10 Thus, because the Strickland line of cases was available to
11 Petitioner during the relevant statute of limitations period, his
12 argument based on section 2244(d)(1)(C) fails. Accordingly, his
13 federal habeas is untimely, unless equitable tolling applies.

14 III. Equitable Tolling

15 The one-year limitations period can be equitably tolled
16 because section 2244(d) is a statute of limitations and not a
17 jurisdictional bar. See Beeler, 128 F.3d at 1288. "When external
18 forces, rather than a petitioner's lack of diligence, account for
19 the failure to file a timely claim, equitable tolling of the
20 statute of limitations may be appropriate." Miles v. Prunty, 187
21 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be
22 available in most cases because extensions of time should be
23 granted only if "'extraordinary circumstances' beyond [a]
24 prisoner's control make it impossible to file a petition on time."
25 Beeler, 128 F.3d at 1288 (citation and internal quotation marks
26 omitted). The prisoner must show that "the 'extraordinary
27 circumstances' were the cause of his untimeliness." Spitsyn v.
28 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). The

1 Ninth Circuit has said that the petitioner "bears the burden of
2 showing that this extraordinary exclusion should apply to him."
3 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). "[T]he
4 threshold necessary to trigger equitable tolling [under AEDPA] is
5 very high, lest the exceptions swallow the rule." Id. at 1066
6 (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir.),
7 cert. denied, 531 U.S. 878 (2000)). The grounds for granting
8 equitable tolling are "highly fact dependant." Lott v. Mueller,
9 304 F.3d 918, 923 (9th Cir. 2002). Where a prisoner fails to show
10 "any causal connection" between the grounds upon which he asserts a
11 right to equitable tolling and his inability to file a federal
12 habeas application timely, the equitable tolling claim will be
13 denied. Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005),
14 amended, 447 F.3d 1165 (9th Cir. 2006).

15 However, "[r]ather than let procedural uncertainties
16 unreasonably snuff out a constitutional claim, the issue of when
17 grave difficulty merges literally into 'impossibility' should be
18 resolved in [a petitioner's] favor." Lott, 304 F.3d at 920. When
19 a prisoner is proceeding pro se, his allegations regarding
20 diligence in filing a federal petition on time must be construed
21 liberally. Roy v. Lampert, 465 F.3d 964, 970 (9th Cir. 2006).

22 Petitioner argues that he is entitled to equitable tolling
23 under "the doctrine of fraudulent concealment." (Mem. in Supp. of
24 Pet. for Writ of Habeas Corpus at 21.) Petitioner summarizes his
25 claim as follows:

26 Due to his lack of adequate knowledge of the
27 law and sole reliance on appointed counsel
28 representing him in the trial and appellate
courts, Petitioner had no objectively
reasonable cause to believe or even remotely

1 suspect that any grounds existed to justify the
2 relief sought by this current petition until
March of 2005, when Petitioner came upon the
3 People v. Davis case.

4 (Pet. at 12-13.) According to Petitioner, it was not until he
5 discovered Davis that he could have known that his counsel had
6 failed to inform him of it. Based upon his total reliance on
7 counsel, he alleges that counsel's failure to inform him of Davis
8 amounts to "fraudulent concealment" entitling him to equitable
tolling.

9 There is no "doctrine of fraudulent concealment" in the
10 equitable tolling context. Petitioner has not alleged any
11 affirmative conduct on the part of his trial or appellate counsel
12 that amounts to concealment. Instead, Petitioner is effectively
13 alleging that he is entitled to equitable tolling because he was
14 ignorant of the law and his former counsel failed to notify him of
15 a new case.

16 Petitioner's argument fails. The law is clear that ignorance
17 of the law and lack of legal experience typically do not excuse
18 untimely filing, even for a pro se incarcerated prisoner. Rasberry
19 v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006).

20 Petitioner also claims that he is entitled to equitable
21 tolling because he was held in the prison's Secure Housing Unit
22 (SHU) and had restricted law library access. Petitioner does not
23 describe in any detail how his law library access was "more
24 restricted" than any other inmate. Further, he alleges no specific
25 set of facts setting forth how long he was housed in the SHU and
26 how his inability to access the law library during that time
27 prevented him from filing his federal habeas petition in a timely
28

1 manner. Therefore, Petitioner's argument fails.

2 Accordingly, Petitioner is not entitled to equitable tolling
3 of the limitations period.

4 IV. Actual Innocence

5 The actual innocence gateway established in Schlup v. Delo,
6 513 U.S. 298 (1995), may be available to a petitioner whose
7 petition is otherwise barred by the AEDPA's limitations period.
8 See Majoy v. Roe, 296 F.3d 770, 776-77 (9th Cir. 2002) (implying
9 that unavailability of actual innocence gateway would raise serious
10 constitutional concerns and remanding to district court for a
11 determination of whether actual innocence claim was established
12 before deciding whether gateway is available under AEDPA). For
13 purposes of this Order, this Court will assume that actual
14 innocence, if established according to the Schlup standard, would
15 avoid the statute of limitations bar.

16 Thus,

17 [i]f a petitioner . . . presents evidence of innocence so
18 strong that a court cannot have confidence in the outcome of
19 the trial unless the court is also satisfied that the trial
20 was free of non-harmless constitutional error, the petitioner
21 should be allowed to pass through the gateway and argue the
22 merits of his underlying claim.

23 Id. at 316.

24 "To be credible, such an actual innocence claim requires
25 petitioner to support his allegations of constitutional error with
26 new reliable evidence -- whether it be exculpatory scientific
27 evidence, trustworthy eyewitness accounts, or critical physical
28 evidence -- that was not presented at trial." Schlup, 513 U.S. at
324. The "new" evidence need not be newly available, just newly
presented -- that is, evidence that was not presented at trial.

1 Griffin v. Johnson, 350 F.3d 956, 961 (9th Cir. 2003).

2 It is not enough that the new evidence show the existence of
3 reasonable doubt; rather, petitioner must show "that it is more
4 likely than not that no 'reasonable juror' would have convicted
5 him." Schlup, 513 U.S. at 329. As the Ninth Circuit has stated,
6 "the test is whether, with the new evidence, it is more likely than
7 not that no reasonable juror would have found [p]etitioner guilty."
8 Van Buskirk v. Baldwin, 265 F.3d 1080, 1084 (9th Cir. 2001). Thus,
9 actual innocence means factual innocence, not merely legal
10 insufficiency. Bousley v. United States, 523 U.S. 614, 623-24
11 (1998) (citing Sawyer, 505 U.S. at 339).

12 In the present case, Petitioner alleges that he is actually
13 innocent of the crimes of which he was convicted in 1996 as well as
14 the 1988 burglary charge to which he pled guilty. Petitioner
15 suggests that due to misconduct on the part of both the defense and
16 the prosecution, his 1996 trial was corrupted and he was falsely
17 convicted. (Opp'n at 20-25.)

18 Petitioner alleges that his defense counsel was ineffective in
19 failing to move to suppress the prosecution's evidence (a bicycle
20 that he possessed, the fact that he was intoxicated, and
21 incriminating statements he made when he was arrested) and failing
22 to obtain exculpatory evidence (fingerprints on the bicycle, a
23 blood-alcohol test). Petitioner also contends that his defense
24 counsel failed to move to strike his 1988 burglary conviction and
25 suborned him to commit perjury by making him testify that he was
26 intoxicated when he was arrested. Petitioner also alleges that the
27 prosecutor committed misconduct by charging Petitioner's previous
28 burglary conviction as a prior.

Petitioner's claims fail because his allegations do not amount to "clear and convincing evidence" that he is actually innocent of either his 1996 or 1988 convictions. Petitioner confuses the actual innocence standard with an inquiry into the merits of his case. He has provided no evidence akin to "credible declarations of guilt by another, trustworthy eyewitness accounts, or exculpatory scientific evidence" to support his innocence. Schlup, 513 U.S. at 324. Instead, he alleges that misconduct at trial caused him to be prejudiced during legal proceedings. Such misconduct has no bearing upon whether he is actually innocent of the crimes of which he was convicted. Accordingly, his actual innocence claim fails.

CONCLUSION

The instant petition for habeas corpus was filed nearly nine years after the statute of limitations expired. Petitioner is not entitled to tolling or a delayed commencement of the limitations period, and his actual innocence claim is unsupported. Therefore, the petition is untimely because the statute of limitations expired on August 9, 1998. Accordingly, Respondent's motion to dismiss (docket no. 8) is hereby GRANTED.

The Clerk of the Court shall enter judgment in accordance with this Order, terminate all pending motions and close the file. The parties shall bear their own costs.

This Order terminates Docket no. 8.

IT IS SO ORDERED.

DATED: 8/28/08



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DALE WILLS,

Plaintiff,

v.

JAMES TILTON et al,

Defendant.

Case Number: CV07-03354 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 28, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: August 28, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California